

STATE OF MICHIGAN
COURT OF APPEALS

In re CHARLES J. BRUNT and LOUISE C.
BRUNT Joint Trust Agreement.

SHARON K. BAKER,

Petitioner-Appellee,

UNPUBLISHED
April 25, 2006

v

BONNIE A. ROBINSON,

Respondent-Appellant.

No. 266492
Calhoun Probate Court
LC No. 2005-000721-TV

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order granting summary disposition in favor of petitioner. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Petitioner and respondent are the daughters of Charles and Louise Brunt. In February 1995, Charles and Louise Brunt (settlers) created the "Charles J. Brunt and Louise C. Brunt Joint Trust Agreement" (trust). Under the terms of the trust, the settlers divided their estate equally between petitioner and respondent. Charles Brunt died on October 1, 2000. Thereafter, in October 2001, Louise Brunt amended the trust. Under the amended trust, the division of the settlers' assets was not as equal as it had been under the original trust agreement in that respondent's share of the real property assets was valued higher than petitioner's share of the real property assets.

Louise Brunt died on January 30, 2005. Following her death, petitioner filed a petition to determine the validity of the amended trust agreement. Petitioner sought a ruling that the amended trust agreement was invalid and that the original trust agreement controlled the distribution of the assets of the trust. Petitioner also moved for summary disposition under MCR 2.116(C)(10), asserting that the amendment to the 1995 trust agreement was invalid because Article VI of the original trust clearly and unambiguously provided that the trust shall become irrevocable upon the death of either settlor and clearly and unambiguously prohibited the amendment of the trust if either of the settlers was deceased. According to petitioner, the trust

therefore became irrevocable upon the death of Charles Brunt on October 1, 2000. Respondent argued that the original trust was patently ambiguous because it contained conflicting provisions regarding whether the trust was revocable after the death of either settlor. Respondent also urged the trial court to adopt the reasoning of the federal district court for the District of Columbia in *Suzan Tantleff Trusts v FDIC*, 938 F Supp 14, 17-19 (DDC 1996), which held that where the settlor of a trust retains the unlimited power to withdraw all income and principal from the trust, the trust is revocable notwithstanding language in the trust declaring that the trust is irrevocable. Respondent finally argued that the trial court should invoke its equitable powers and impose a constructive trust on the disputed property in favor of respondent.

The trial court denied respondent's request that it invoke its equitable power to impose a constructive trust on the disputed property in favor of respondent, stating that it was not authorized to enforce an illegal amendment. While the trial court did not explicitly rule on the application of the *Tantleff* case, the trial court did observe that the trust language was inconsistent because it both permitted either settlor to remove or withdraw all of the property from the trust and at the same time declared the trust to be irrevocable upon the death of either settlor. Although the trial court acknowledged that the language in the trust regarding the power of the surviving spouse to amend the trust was inconsistent, the trial court ultimately concluded that the trust agreement clearly and unambiguously provided that the trust agreement could not be amended if either settlor was mentally incapacitated or deceased. Therefore, the trial court granted petitioner's motion for summary disposition under MCR 2.116(C)(10).

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id.* at 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exch*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

We review a probate court's interpretation of a trust agreement for clear error. *Miller v Dep't of Mental Health*, 432 Mich 426, 434; 442 NW2d 617 (1989); *In re Green Charitable Trust*, 172 Mich App 298, 311; 431 NW2d 492 (1988). A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *In re Estes Estate*, 207 Mich App 194, 208; 523 NW2d 863 (1994).

III. ANALYSIS

Respondent first argues that the trial court erred in concluding that the trust agreement unambiguously prohibited the surviving settlor from amending the trust upon the death of the other settlor. According to respondent, the trust agreement was patently ambiguous regarding the validity of an amendment to the trust by a surviving spouse, and the trial court should have held an evidentiary hearing on the issue of the settlors' intent regarding this issue. We disagree.

The same general rules that apply to judicial review of wills also apply to judicial review of trust documents. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985). In reviewing a trust, this Court must give effect to the settlor's intent as expressed in the trust. *Id.* If a trust is not ambiguous, intent is to be determined from the trust itself. *Id.* However, if the language of a trust is ambiguous, the court is permitted to look outside the four corners of the trust to determine the settlor's intent. *Id.*; *In re Burruss Estate*, 152 Mich App 660, 666; 394 NW2d 466 (1986). A patent ambiguity exists if an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language. *In re Woodworth Trust*, 196 Mich App 326, 327-328; 492 NW2d 818 (1992). A latent ambiguity arises where the language used is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates the possibility of more than one meaning. *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). If a trust contains a patent or latent ambiguity, a court may establish intent by considering the circumstances surrounding its execution and the rules of construction. *In re Maloney Trust*, *supra* at 639. Where an ambiguity exists, extrinsic evidence is admissible: (1) to prove the existence of ambiguity, (2) to indicate the parties' actual intent, and (3) to indicate the parties' actual intent as an aid in construction. *In re Kremlick Estate*, *supra* at 241.

At issue in this case is the validity of Louise Brunt's amendment to the trust after the death of her husband. Article VI of the trust agreement specifically addresses amendments to the trust agreement and provides:

POWER TO AMEND OR REVOKE

This trust is hereby created and the interests hereunder are held by the Trustee, subject to the express condition, power and reservation on the part of the Settlers to alter or amend this agreement or revoke the Trust herein created in whole or in part, and to free all or any policies of insurance or other property of any kind which may be placed in this Trust from the terms of this Trust at any time during the joint lifetimes of the Settlers, upon written notification to that effect executed by the Settlers jointly, while both are living and mentally competent to do so, and individually by the surviving Settlor while he or she is mentally competent to do so, and delivered to the Trustee; provided, however, that the duties, liabilities and powers of the Trustee shall not be changed without its consent. Upon receipt of such written notice, the Trustee shall surrender such policies of insurance or other properties as are therein described, and shall also account to the Settlers for any funds or property held by the Trustee under the terms of this Agreement. This Trust shall become irrevocable upon the death of either Settlor and may not be amended if either Settlor is mentally incapacitated or is deceased. [Emphasis added.]

Although the trust agreement clearly and unambiguously provides in the last sentence of Article VI that the trust is irrevocable upon the death of either settlor and may not be amended if either settlor is mentally incapacitated or deceased, the first sentence of Article VI permits the surviving settlor to amend the trust as long as he or she is mentally competent. Therefore, contrary to the trial court's conclusion, we find that the language of the trust is patently ambiguous because the two provisions in Article VI directly contradict each other. Because the trust is ambiguous, it is appropriate to consider extrinsic evidence regarding the circumstances surrounding the execution of the trust and the rules of construction. *In re Maloney Trust*, *supra* at 639.

In this case, the rules of construction and extrinsic evidence regarding the circumstances surrounding the execution of the trust both support the trial court's conclusion that the trust prohibited amendments to the trust by the surviving settlor after the other settlor's death. "It is a well-established rule of construction that, if two clauses in a will are absolutely irreconcilable, the last prevails, as being the latest expression of the testator's wishes." *Foster v Stevens*, 146 Mich 131, 139; 109 NW 265 (1906). The provisions in the first and last sentences of Article VI regarding the validity of amendments to the trust after the death of one of the settlors are absolutely irreconcilable. However, the provision providing that the trust would become irrevocable upon the death or incapacity of either settlor and could not be amended thereafter was the last provision and therefore must prevail as being the latest expression of the settlors' wishes. Furthermore, if a trust contains contradictory or ambiguous provisions, the trust instrument must be read and construed as a whole. *Detroit Trust Co v Rivard*, 315 Mich 62, 70-71; 23 NW2d 206 (1946). Interpreting the trust as prohibiting amendments after the death of a settlor is not inconsistent with the trust instrument as a whole. The conclusion that the trust prohibits amendments after the death of a settlor is also supported by extrinsic evidence regarding the circumstances surrounding the execution of the trust. Petitioner attached to her motion for summary disposition a copy of a memorandum written by the drafter of the original trust and dated October 27, 1994. The memorandum contains notes regarding the settlors' wishes regarding the inclusion of certain provisions in the trust agreement and included the following specific statement regarding the revocability of the trust in the event of the death of either settlor: "This Trust become [sic] IRREVOCABLE upon death or incapacity of either Mr. or Mrs. Brunt!!" We conclude that this extrinsic evidence and the rules of construction both support the conclusion that the trust was irrevocable and could not be amended upon the death of either settlor.

Respondent next urges this Court to adopt the holding of the federal district court in the District of Columbia in *Tantleff*, *supra*. We decline to do so. At the outset, we observe that the trust agreement specifically provides that "[a]ll questions of validity and interpretation shall be decided according to Michigan law." In reviewing a trust, this Court must give effect to the settlor's intent as expressed in the trust. *In re Maloney Trust*, *supra* at 639. Furthermore, we also observe that *Tantleff* has been rejected by at least one other court. See *Crook v Contreras*, 95 Cal App 4th 1194, 1208 (2002) (concluding that the holding in *Tantleff* was "fatally flawed" because the federal district court "based its decision on the fallacy that it was supported by New York and federal case law.") But see 2 Restatement Trusts, 3rd, § 63, comment k, pp 462-463 (criticizing *Crook*'s rejection of *Tantleff*). We also conclude that *Tantleff* is distinguishable from the instant case because in *Tantleff*, only one trustee was involved, so *Tantleff* did not address a provision regarding the irrevocability of a joint trust upon the death of one of the settlors. For

these reasons, we are not persuaded that the reasoning in *Tantleff* applies to the facts of this case and, because we are not bound by the precedent of federal courts, *Lee v Nat'l Union Fire Ins Co*, 207 Mich App 323, 328; 523 NW2d 900 (1994), we decline to rely on the holding of the federal district court in *Tantleff*.

Respondent finally argues that the trial court erred in declining to impose a constructive trust over the property in favor of respondent. A probate court judge is vested with the authority to impose a constructive trust. MCL 700.1303(1)(g). A constructive trust may be imposed when it is necessary to ensure equity or prevent unjust enrichment. *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993). A constructive trust may be imposed when property “has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one’s weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property” *Id.* (citations omitted). Such a trust “may not be imposed upon parties ‘who have in no way contributed to the reasons for imposing a constructive trust.’” *Id.*, quoting *Ooley v Collins*, 344 Mich 148, 158; 73 NW2d 464 (1955). The burden of proof is upon the person seeking the constructive trust. *Id.*

In this case, the trial court properly refused to impose a constructive trust over the disputed property in favor of respondent because respondent did not satisfy her burden to establish that she was entitled to a constructive trust. The amendment to the trust failed not because of petitioner’s or respondent’s conduct, but because the original trust prohibited amendments to the trust upon the death of either settlor, and Louise Brunt attempted to amend the trust in violation of this provision after the death of Charles Brunt. The record contains no evidence of fraud, misrepresentation, concealment, undue influence, duress, taking advantage of another person’s weakness, or necessities, or any other similar circumstances which would warrant the imposition of a constructive trust. A constructive trust is imposed when it is necessary to ensure equity or prevent unjust enrichment. We find that the equities in this case simply did not warrant imposition of a constructive trust. Therefore, the trial court properly refused to invoke its equitable powers to impose such a trust.

Affirmed.

/s/ Jane E. Markey

/s/ Bill Schuette

/s/ Stephen L. Borrello